

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT-CHANCERY DIVISION**

**ERIC VIGUERAS,**

**Plaintiff,**

**v.**

**GARY M. MCCARTHY, Superintendent of  
the Chicago Police Department, and THE  
POLICE BOARD OF THE CITY OF  
CHICAGO,**

**Defendants.**

**No. 12 CH 39387**

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**MEMORANDUM OPINION AND ORDER**

The Plaintiff, Eric Vigueras, seeks administrative review of the decision of the Defendant, the City of Chicago Police Board ("Board"), to discharge Mr. Vigueras from his position as a Chicago Police Officer as a result of being found guilty of several rule violations. On September 21, 2012, the Board issued its Findings and Decisions ("Board's Decision") discharging Mr. Vigueras for various rule violations that occurred during an off-duty incident on December 23, 2006. The incident involved Mr. Vigueras' girlfriend at the time, Diana Castillo, and a civilian, Cleveland Dean.

Mr. Vigueras asks the Court to reverse the Board's Decision on the basis that the charges were barred by the statute of limitations found in 65 ILCS 5/10-1-18.1, his due process rights were violated, General Order 90-03 and section 2-57-070 of the Municipal Code were violated, laches, the Board's findings were against the manifest weight of the evidence, and the penalty of discharge was excessive.

## **BACKGROUND**

The incident that gave rise to these proceedings against Mr. Viguera occurred on the morning of December 23, 2006 around 1:00 a.m. Mr. Viguera worked the day of December 22, 2006. After his shift he went to Swig, a restaurant and bar, to host a going away party for his friend Nefataly Hernandez. Mr. Viguera was accompanied to the party by Ms. Castillo. Swig is located on Milwaukee Avenue, in Chicago, next to another bar called Salud Tequila Bar ("Salud").

At some point around 1:00 a.m., Ms. Castillo left the party upset with Mr. Viguera and Mr. Viguera followed her. Witnesses claimed that Ms. Castillo was screaming and that they saw Mr. Viguera push and shove her against one of the storefronts. At that point, one of those witnesses, Cleveland Dean, who had left Salud and was walking towards the two, approached them and stated, "Hey, it's a peaceful neighborhood. You've got a beautiful girl. I am very sure, you know, you guys can resolve this in a better way. You know, just calm down and we'll see what's the problem." In response, it is alleged, that Mr. Viguera pulled his gun, identified himself as a police officer, put the gun to Mr. Dean's head, and threatened him. It is also alleged that Mr. Viguera hit Mr. Dean in the temple and jaw with the gun and that the two began to fight. Mr. Dean stated that once they began to fight, he hit Mr. Viguera in the jaw. According to Mr. Viguera there were at least two other men with Mr. Dean who fought with him that night.

At some point, Mr. Viguera's gun ended up on the sidewalk and was retrieved by employees of Salud. When Mr. Viguera and Mr. Dean were finally pulled apart, Mr. Viguera ran into Salud and attempted to retrieve his gun.

Several people saw Mr. Viguera pull his gun and called 911. Several officers arrived on the scene. Mr. Dean told them that he wanted to press charges against Mr. Viguera, but said

that the officers refused to take a report. Neither Mr. Dean nor Mr. Viguera was arrested. Mr. Dean filed a report with the Independent Police Review Authority ("IPRA") the same day, December 23, 2006, and an investigation into the incident was opened.

By June 12, 2007, the IPRA investigators had received statements from twelve civilian witnesses and twenty officers. On January 8, 2010, Mr. Viguera was relieved of his police power and placed on duty restrictions. On January 15, 2010, the IPRA investigation was marked as complete, and a closing report was signed January 26, 2011.

On January 9, 2012, the Department filed charges for rule violations against Mr. Viguera based on the December 23, 2006 incident. At that time Mr. Viguera was charged with the following rule violations:

- Rule 2 Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.  
For grabbing and pushing Ms. Castillo, for getting into a fight with Mr. Dean (including hitting him with the gun), and for threatening to shoot Mr. Dean.
- Rule 8 Disrespect to or maltreatment of any person, while on or off duty.  
Count I – for grabbing and pushing Ms. Castillo  
Count II – for pulling his gun on Mr. Dean and threatening him  
Count III – for hitting Mr. Dean with his gun
- Rule 9 Engaging in any unjustified verbal or physical altercation with any person, while on or off duty.  
Count I – for grabbing and pushing Ms. Castillo  
Count II – for getting into a fight with Mr. Dean
- Rule 14 Making a false report, written or oral.  
For lying to the IPRA about his actions during the December 23, 2006 incident on January 19, 2007
- Rule 15 Intoxication on or off duty.  
For being intoxicated off duty
- Rule 38 Unlawful or unnecessary use or display of weapon.  
For displaying his gun without lawful justification.



## STANDARD OF REVIEW

The standard of review for an administrative decision depends on whether the Court is presented with a question of fact or law or a mixed question of fact and law. *Cinkus v. Village of Stickney*, 228 Ill. 2d 200, 210 (2008). A question of fact is reviewed under the manifest weight of the evidence standard. *Id.* A question of law is reviewed de novo. *Id.* An agency's decision involving a mixed question of law and fact should only be overturned if it is "clearly erroneous." *Marconi v. Chicago Heights Police Pension Bd.*, 225 Ill. 2d 497, 533 (2006).

"The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110. Furthermore, "[i]t is the responsibility of the administrative agency to weigh the evidence and determine the credibility of witnesses...and the reviewing court may not reweigh the evidence." *Payne v. Ret. Bd. of the Firemen's Annuity & Benefit Fund of Chicago*, 2012 IL App (1st) 112435, ¶53. A mixed question of law and fact exists when the court is asked to examine the legal effect of a given set of facts. *Filskov v. Bd. of Trustees of the Northlake Police Pension Fund*, 409 Ill. App. 3d 66, 69 (1st Dist. 2011). An agency decision is clearly erroneous if the reviewing court is left with the conviction that a mistake was made. *Cinkus*, 228 Ill. 2d at 211. When reviewing questions of fact or mixed questions of law and fact, "the mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently" are not grounds for reversal. *Robbins v. The Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997). The agency's decision should be upheld if there is evidence in the record to support its decision. *Abrahamson v. Ill. Dept. of Prof. Regulation*, 153 Ill. 2d 76, 88 (1992).

## THE RECORD

### *A. Procedural History Before the Board*

On February 14, 2012, the Board sent Mr. Vigueras a notice of hearing setting an initial status hearing on February 25, 2012. All of the hearing proceedings were conducted by hearing officer Michael Berland.

On February 25, 2012, the hearing was continued to March 20, 2012. On March 20, 2012, a briefing schedule for Mr. Vigueras' motion to dismiss was set. Mr. Vigueras sought to dismiss all charges and argued that they were barred by the five-year statute of limitations found in 65 ILCS 5/10-1-18.1, laches, violation of due process, violation of the Chicago Police Department's General Orders, and a violation of section 2-57-070 of the City of Chicago's Municipal Code. A hearing on Mr. Vigueras' motion to dismiss was held on May 24, 2012.

On June 12 and 13, 2012, the hearing officer held the evidentiary hearing at which several witnesses testified and the parties were permitted to introduce evidence. On September 21, 2012, the Board issued its Decision in which it dismissed two of the counts pursuant to Mr. Vigueras' motion to dismiss and found Mr. Vigueras guilty of the remaining counts. The Board found that any of one of the rule violations justified Mr. Vigueras' discharge.

The Board mailed its Decision to Mr. Vigueras on September 24, 2012. On October 25, 2012, Mr. Vigueras filed his complaint for administrative review within the thirty-five day period provided for under the Administrative Review Law. 735 ILCS 5/3-103. The parties' submitted briefs and the record to the Court, and the Court held an oral argument on August 20, 2012. At all times, Mr. Vigueras was represented by his attorney, Colleen Daly.

### *B. The Witness Testimony*

During the two-day hearing, the hearing officer received testimony from twenty-two witnesses. Twelve of the witnesses were present at Salud or Swig at the time of the incident. These witnesses either saw the incident or saw Mr. Vigueras before or after the incident. Four of the witnesses were officers that responded to the scene after calls to 911 were made. Five of the witnesses were called as character witnesses for Mr. Vigueras, and one of the witnesses was hired by Mr. Vigueras' attorney as an investigator in this case. A summary of each of the witnesses' testimony is detailed below in the order in which they were called.

Cleveland Dean. Mr. Dean testified to the events of the evening and what led to his altercation with Mr. Vigueras. According to Mr. Dean, he had been working on the evening of December 22, 2006 at People's Lounge as a special events coordinator. People's Lounge is one block southeast of Salud. Mr. Dean left People's Lounge to go meet Ms. Cruz whom he had met earlier in the evening and to gauge business in the area, which he said was part of his job as the special events coordinator at People's Lounge. Mr. Dean arrived at Salud and stayed for about fifteen minutes. Mr. Dean testified that he knew Ms. Cruz from earlier in the evening but had never met her before that day. Mr. Dean admitted to having two glasses of wine before the altercation with Mr. Vigueras occurred.

Mr. Dean testified that after leaving Salud, he saw Mr. Vigueras get into an altercation with his girlfriend. Mr. Dean said that he approached the two and said, "Hey, it's a peaceful neighborhood. You've got a beautiful girl. I am very sure, you know, you guys can resolve this in a better way. You know, just calm down and we'll see what's the problem." According to Mr. Dean, Mr. Vigueras then pulled his gun, announced that he was a police officer, and threatened Mr. Dean. Mr. Dean testified that Mr. Vigueras hit him with the gun in his temple and jaw and



the two began to fight. Mr. Dean admitted that he hit Mr. Vigueras in the jaw while they were fighting. Mr. Dean stated that he did not have anyone with him that night, but that he heard Mr. Vigueras tell the uniformed police officers that four guys were involved.

According to Mr. Dean other officers arrived on the scene and refused to let him press charges against Mr. Vigueras. Mr. Dean also testified that he was never placed in handcuffs or arrested. The injuries suffered by Mr. Dean were scrapes, swelling, and soreness. Photos of Mr. Dean's injuries were admitted into evidence during the hearing. Mr. Dean testified that he could not remember what he did for the remainder of the evening because a lot happened that night and it was a long time ago. Mr. Dean testified that he went to file a complaint with the IPRA later in the day on December 23, 2006.

On cross-examination, Ms. Daly confronted Mr. Dean with two posts from his Facebook and Twitter accounts. Mr. Dean admitted to writing a Facebook post that indicated he "busted a cops [*sic*] head open," and to a post on Twitter in which he called police "lazy f\*cks."

Brian Frost. The next witness to testify was Mr. Frost. Mr. Frost was at the intersection waiting to turn left when he saw two males, one Hispanic and one Black, on the sidewalk. Mr. Frost testified that he saw the Hispanic male pull a gun and shoved the Black male. Mr. Frost did not identify the males as either Mr. Dean or Mr. Vigueras. Mr. Frost called 911 and testified that this happened around 1:14 a.m.

IPRA Investigator Benedict Anaele. The parties' stipulated to IPRA Investigator Anaele testimony that Investigator Anaele took Mr. Dean's initial complaint regarding this matter on December 23, 2006 and that Mr. Dean told him he wanted to consult with an attorney before providing a sworn statement or affidavit.

IPRA Investigator Shykela Carter. The parties also stipulated to Investigator Carter's testimony. Investigator Carter met with Mr. Dean, on December 29, 2006, for a photo line-up, and Mr. Dean was unable to identify Mr. Viguera.

IPRA Investigator Alice Chico. Investigator Chico took a statement from Mr. Dean on December 23, 2006, and Mr. Dean said that he could not remember where he struck Mr. Viguera. Investigator Chico also testified that Mr. Dean told her that he heard the uniformed officers at the scene say that they needed to find Mr. Viguera's gun so that they could get him out of the area.

Diana Jean-Louis. Ms. Jean-Louis was out celebrating her cousin's birthday, along with Janet Cruz, on the evening of December 22, 2006. Ms. Jean-Louis and her friends started out at People's Lounge and then went to Salud. Ms. Jean-Louis was leaving Salud when she saw the altercation between Mr. Dean and a male, who she said could have been Hispanic or white. Ms. Jean-Louis testified that she saw the Hispanic/white male fighting with his girlfriend and that she heard Mr. Dean say, "you don't have to hit a girl like that." Ms. Jean-Louis testified that she saw the male hit his girlfriend and pull her hair. According to Ms. Jean-Louis, the male began hitting Mr. Dean and pulled his gun out. Ms. Jean-Louis said that she did not know Mr. Dean prior to this incident and she has not spoken to him since the incident.

After the incident between Mr. Viguera and Mr. Dean was over, Ms. Jean-Louis testified that she saw the male run into Salud. Ms. Jean-Louis called 911 to report a man with a gun. A recording of Ms. Jean-Louis 911 call was admitted into evidence and was consistent with her testimony.



Ms. Jean-Louis could not identify Mr. Viguera other than to say that the male she saw fighting with Mr. Dean was Hispanic or white. She also testified that she never provided a description of Mr. Viguera until the hearing.

When questioned about her refusal to initially cooperate with the IPRA investigation, Ms. Jean-Louis testified that she did not cooperate because she feared backlash from the police and that when she did try to provide information, she was unable to get in contact with the IPRA investigator.

Janet Cruz. Ms. Cruz met Mr. Dean the night of the incident. She only knew him as Q and did not know his real name. Ms. Cruz testified that she hung out with Mr. Dean for a couple of hours that evening and that they exchanged phone numbers. Ms. Cruz testified that she saw Mr. Viguera being aggressive with his girlfriend and that his girlfriend was screaming. According to Ms. Cruz, Mr. Dean approached them non-aggressively. Ms. Cruz testified that she could not hear what being said, but that she saw Mr. Viguera pull out a silver gun and hit Mr. Dean with it.

On cross-examination, Ms. Cruz acknowledged that her statement to the IPRA did not say that Mr. Viguera's girlfriend was screaming or that Mr. Dean was hit in the head. She did testify that she tried to tell the uniformed police who arrived on the scene what happened. Ms. Cruz also admitted that she could not identify Mr. Viguera to the IPRA Investigator. In addition, when asked whether she believed Mr. Viguera was drunk, Ms. Cruz said that she could not tell.

Ms. Cruz testified that after the incident, she spoke with Mr. Dean once, and he told her to write a statement if she saw anything.

Adam Geenan. Mr. Geenan was the general manager at Salud and was at Salud the night of the incident. Mr. Geenan testified that he did not see the altercation and called 911 at the direction of one of his employee, Joseph Lore. Mr. Geenan testified that Mr. Lore and Henry Heredia brought a gun to his basement office and identified Mr. Viguera as the person who came to retrieve the gun. Mr. Geenan testified that he also identified Mr. Viguera in a line-up done by the IPRA. According to Mr. Geenan, Mr. Viguera was accompanied by two other police officers and that there were a number of police cars on the scene.

When questioned about whether he believed Mr. Viguera was intoxicated, Mr. Geenan was of the opinion that he was. Mr. Geenan testified that he heard Mr. Viguera say that he had been drinking and that Mr. Viguera smelled like alcohol.

When asked about whether he knew Mr. Dean, Mr. Geenan testified that he knew Mr. Dean from the neighborhood and spoke to Mr. Dean a few days after the incident. He did not remember their conversation.

Joseph Lore. Mr. Lore was the assistant manager at Salud. Mr. Lore did not see the incident, but another bar tender told him to call the police. Mr. Lore saw Mr. Viguera when Mr. Heredia showed Mr. Lore the gun. Mr. Lore was able to identify Mr. Viguera. Mr. Lore testified that Mr. Viguera told him that he was drunk and that Mr. Lore believed Mr. Viguera was intoxicated. Mr. Lore claimed that he saw Mr. Viguera leave in a police car and that there were at least five other uniformed officers on the scene.

In regards to Mr. Dean, Mr. Lore testified that he did not know Mr. Dean, but that Mr. Dean did come into Salud to talk to him the day after the incident.

Sergeant Centeria Moore-Powell. Sergeant Moore-Powell was called as a character witness. Sergeant Centeria Moore-Powell knows Mr. Viguera from being his supervisor for two

years. Sergeant Moore-Powell did not know Mr. Viguera in 2006 at the time of the incident. Sergeant Moore-Powell testified that Mr. Viguera was a good officer, eager to learn, followed orders, and went above and beyond what was asked of him. Sergeant Moore-Powell testified that Mr. Viguera was never disrespectful, rude or loud when dealing with citizens and cared about Mr. Viguera's career as a police officer.

Jamie Zalkus. Ms. Zalkus was also called as a character witness. She was Mr. Viguera's current girlfriend at the time of the hearing. Ms. Zalkus testified that she had been dating Mr. Viguera for five years and that he had never been physically or verbally abusive. Ms. Zalkus described Mr. Viguera as a Type A personality, dedicated to his school work, hardworking, and honest. On cross-examination Ms. Zalkus admitted that she lives with Mr. Viguera and that they split their joint financial obligations.

John Carpino. Mr. Carpino was a former police officer and a current professor at Lewis University. Mr. Carpino met Mr. Viguera when he took his white collar crime class in the summer of 2008. Mr. Viguera also took a second class taught by Mr. Carpino. Mr. Carpino testified that he has stayed in contact with Mr. Viguera ever since. Mr. Carpino described Mr. Viguera as being dedicated to his work and studies, professional, and loyal. Mr. Carpino also opined that based on his experience with Mr. Viguera, he would be happy to have him work for him on any police department.

Michael Fron, Jr. Mr. Fron knows Mr. Viguera from a band they played in together in 2005 and was at the party for Mr. Hernandez on the evening of December 22, 2006. Mr. Fron testified that he did not see Mr. Viguera drinking that evening. Mr. Fron testified that he did see Mr. Viguera arguing with his girlfriend, but that he did not see the incident with Mr. Dean. Mr.



Fron testified that he did see other police officers on the scene when he left the party at Swig. Mr. Fron confirmed that he was still friends with Mr. Viguera.

Officer Charlene Rusiecka. Officer Rusiecka is a Chicago Police Officer who knows Mr. Viguera from high school and considers him a good friend. Officer Rusiecka also attended the party for Mr. Hernandez and arrived around 11:30 p.m. that night. Officer Rusiecka testified that she only saw Mr. Viguera drinking a coke that night. Officer Rusiecka did not see the incident that night, and she claimed that she did not talk to Mr. Viguera about it. Officer Rusiecka was outside of Swig when the other police officers arrived. Officer Rusiecka admitted that she would not want Mr. Viguera to lose his job.

Neftaly Hernandez. Mr. Hernandez has known Mr. Viguera since they were fourteen years old. On December 22, 2006, Mr. Viguera was hosting a party for him because he was being re-stationed to Germany. Mr. Hernandez testified that he does not remember Mr. Viguera drinking that night and that he was suspicious that something was wrong between Mr. Viguera and his girlfriend. Later in his testimony, Mr. Hernandez testified that Mr. Viguera and his girlfriend were having a verbal altercation. Mr. Hernandez said that when he went outside to follow Mr. Viguera, there were two men and that only one of them jumped Mr. Viguera. Mr. Hernandez testified that he intervened in the fight at that point. According to Mr. Hernandez, when he intervened in the fight, a gun was pointed to his head. He was unable to describe the man who did it. Mr. Hernandez claimed that he just went back to Swig after the incident.

Mr. Hernandez learned about the investigation from Mr. Viguera. He testified that he was never contacted by IPRA and that he never was asked to provide a statement.

David O'Callaghan. Mr. O'Callaghan was hired by Mr. Viguera's counsel as a private investigator to speak to several of the witnesses involved in this matter. Mr. O'Callaghan was hired at some point in 2010 or earlier.

Mr. O'Callaghan testified that he interviewed Mr. Dean on May 23, 2010, but did not record the conversation. According to Mr. O'Callaghan, Mr. Dean said that he provided "OPS with a list," and that "the only person who jumped him was me." Mr. O'Callaghan testified that the only record of the interview that he had was his own notes. On cross-examination, Mr. O'Callaghan admitted that he compiled his notes after speaking to several more witnesses.

Officer Elise Middleton. Officer Middleton is a Chicago Police Officer who responded to the 911 calls from Salud. She was told by dispatch that the 911 calls reported there was a Hispanic male in a striped shirt with a gun outside of Salud. Officer Middleton testified that when she arrived on the scene, she saw a man matching that description. Officer Middleton was never asked whether that man was Mr. Viguera.

Gabrielle Bek Dyson. Ms. Dyson was a server at Salud the night of the incident. She testified that she knew Mr. Viguera from him coming into Salud on previous occasions doing walk-throughs of the bar. Ms. Dyson testified that she also knew Mr. Dean because he worked in the area. Ms. Dyson testified that she only observed a pile of people fighting in the intersection and Mr. Dean getting beat up. Ms. Dyson said that she did not realize that Mr. Viguera was involved until other people started talking about the fight. Ms. Dyson testified that she did see Mr. Viguera being escorted out of Salud by other police officers.

Officer Martin Preib. Officer Preib is a Chicago Police Officer who met Mr. Viguera when they worked on the summer bike detail. Officer Preib could not remember the exact year, but testified that it was five to six years prior to the hearing. Officer Preib testified that he

thought Mr. Viguera was intelligent, knowledgeable about the law, treated people kindly, and was a likeable person. Officer Prieb also detailed an arrest that Mr. Viguera made of a murder suspect. Officer Prieb concluded that he would work with Mr. Viguera again if given the chance and did not want to see Mr. Viguera lose his job.

Jesus Salazar. Mr. Salazar was also called as a character witness. He knew Mr. Viguera because he was Mr. Viguera's mother's attorney in a real estate transaction. Mr. Salazar testified that he and Mr. Viguera have been friends for the past ten years. Mr. Salazar described Mr. Viguera as well and mild-mannered, respectful, and pleasant to be around. Mr. Salazar testified that he did not want to see Mr. Viguera lose his job.

Eric Viguera. Mr. Viguera testified that he started out at the Chicago Police Department in 2003. On the evening of December 22, 2006, he arrived to Mr. Hernandez's party at Swig, which he was hosting, at 10:30 p.m. When asked why he took his gun with him, Mr. Viguera responded that he did not want to leave it unsecured in the car. Mr. Viguera denied drinking any alcohol that evening.

Mr. Viguera testified that he remembered seeing Officer Rusiecka at the party and that he met his girlfriend, Diana Castillo, at the party. Mr. Viguera testified that he told Ms. Castillo that he would have to work the holidays and she got upset and left Swig. Mr. Viguera testified that he followed Ms. Castillo out. According to Mr. Viguera, he and Ms. Castillo were talking, but were not arguing or screaming. At that point, Mr. Viguera testified that a Black male, whom he identified as Mr. Dean, attempted to wedge himself between Mr. Viguera and Ms. Castillo. After Mr. Dean wedged himself between the two, Mr. Viguera testified that he pushed Mr. Dean and said "relax."



According to Mr. Viguera, Mr. Dean approached them again and this time Mr. Viguera used two hands to move Mr. Dean. In response to this, Mr. Viguera testified that Mr. Dean became aggressive and advanced toward Mr. Viguera. Mr. Viguera told him to "stop," announced that he was a police officer, and that Mr. Dean needed to leave. Mr. Viguera then grabbed Ms. Castillo's arm and told her that they needed leave. Mr. Viguera said that he and Ms. Castillo began walking back towards Swig and Mr. Dean began following them.

Mr. Viguera testified that he made it back into Swig, closed the tab for the party, said good-bye to a few people, and he and Ms. Castillo left again. After leaving Swig, Mr. Viguera testified that Mr. Dean rushed him and hit him on the side of the face. Mr. Viguera testified that he told Mr. Dean to "stop" and again announced that he was a police officer. At this point, Mr. Viguera testified that a second individual, who he described as a light-skinned Black male, ran towards him, un-holstered his weapon (which he claimed was covered by his sweater), and hit him with it. When asked about the involvement of his friend, Mr. Hernandez, Mr. Viguera testified that he did not know he was involved in the altercation until Mr. Hernandez told him that a few weeks ago.

After being hit with his weapon, Mr. Viguera testified that he felt dazed and fell to the ground. He testified that his gun fell to the ground at the same time. Mr. Viguera testified that he then saw a bald white male pick up his gun and go inside Salud. Mr. Viguera testified that he went into Salud and retrieved his gun from an employee at the bar. Mr. Viguera did not remember there being any other uniformed police officers present when he retrieved his gun and testified that he never went into the basement of Salud. Mr. Viguera testified that he was escorted out of Salud by an employee. After being escorted out, Mr. Viguera testified that he went back to his car and that he never spoke to any on-duty police officers that night.

Mr. Viguera testified that he did not know if there were other people outside who observed the altercation between him and Mr. Dean and then he clarified his statement to say he did not know who they were. He admitted that he told the IPRA in January of 2006 that when Mr. Dean approached him, Mr. Dean was alone. Mr. Viguera also testified that he believed he was the victim of battery, but admitted that he did nothing to report it in any way.

Henry Heredia. Mr. Heredia was working security at Salud the night of the incident and testified that he saw the entire altercation. According to Mr. Heredia, Mr. Dean was accompanied by another Black male when he approached Mr. Viguera. Mr. Heredia said that he saw the three yelling and then they started fighting. Mr. Heredia said that a gun fell from one of the men.

After the gun fell, Mr. Heredia said that Mr. Dean and the other Black male began to follow Mr. Viguera back towards Swig and that Mr. Viguera went into Swig. Mr. Heredia testified that the three began to fight again after Mr. Viguera exited Swig. This time Mr. Heredia said he saw a gun fall from Mr. Viguera. Mr. Heredia testified that one of the Black males grab the gun and hit Mr. Viguera with it. Mr. Heredia testified that he heard Mr. Viguera identify himself as a police officer.

Mr. Heredia testified that he then stepped into the altercation and pulled the gun away from the Black male and Mr. Viguera and took it to the basement office inside of Salud. Mr. Heredia's testimony was unclear as to which Black male he took the gun from. Mr. Heredia testified that Mr. Viguera followed him to the basement, identified himself as a police officer, and requested his gun back. Mr. Heredia said that there were no other police officers in the basement at that time. Mr. Heredia testified that he thinks he smelled alcohol on Mr. Viguera's breath at that time.

Mr. Heredia testified that he does not know Mr. Vigueras and does not forget faces.

911 Calls. A compact disc containing audio files of the 911 calls made that evening by various witnesses was also submitted into evidence. In one of the calls, Mr. Frost told the 911 operator that he saw a man point a gun in another man's face. Mr. Frost describes the man with a gun as Hispanic and medium build.

In Ms. Jean-Louis' 911 call she also stated that there was a man with gun and that he ran into Salud. Mr. Jean-Louis was unable to provide a further description of the man she saw with the gun at the time.

In the 911 dispatch communication to the Chicago Police Department, the 911 operator described the man with a gun as Hispanic and medium build.

#### *C. The Board's Decision*

In its decision, the Board granted Mr. Vigueras' motion to dismiss in part and denied it in part. The Board addressed each of the arguments raised by Mr. Vigueras' motion and meticulously went through the evidence as it related to each rule violation. Mr. Vigueras sought dismissal of his charges on the basis that they were barred by the statute of limitations, resulted in a violation of his due process, laches, and brought in violation of the Police Department's General Orders and the Municipal Code.

The Board determined that any of the charges related to Mr. Vigueras's encounter with Mr. Dean were barred by the statute of limitations found in section 10-1-18.1 of the Municipal Code. Accordingly, the Rule 8 Count III charge and Rule 9 Count II charge were dismissed. The Board interpreted section 10-1-18.1 to bar only charges relating to actions by a police officer acting in his official capacity. The Board reasoned that because Mr. Vigueras announced that he was a police officer to Mr. Dean, and not to Ms. Castillo, his actions were brought within the



statute of limitations. The Board concluded that the charges were barred because they were filed in January 2012 over five years after the incident.

After dismissing these two charges, the Board next considered Mr. Viguera's due process argument. Mr. Viguera argued that the length of the investigation and over five-year delay in filing the charges against him violated his due process rights. The Board denied Mr. Viguera's request to dismiss the charges on this basis because the Board interpreted the cases cited by Mr. Viguera to only apply to a delay in adjudication and not in investigation. The Board recognized that there was a delay in the investigation, but concluded that Mr. Viguera's due process rights were not violated because there was no delay in the adjudication of the charges once they were brought.

The Board then considered Mr. Viguera's laches argument. The Board denied Mr. Viguera's motion on this basis because the Board found that Mr. Viguera failed to show the prejudice he suffered as a result in the delay in bringing charges. The Board noted that Mr. Viguera was able to locate Neftaly Hernandez, who was favorable to his case, and that Mr. Viguera failed to allege that he attempted to locate other witnesses but was unable to do so. The Board found Mr. Viguera's assertion of the existence of additional witnesses or material evidence in favor of Mr. Viguera speculative.

Finally, the Board addressed Mr. Viguera's argument that the charges should be dismissed because the IPRA investigators did not properly seek investigation extensions or satisfy the notification requirements in General Order 93-03 and IPRA regulation 2-57-070 found in the Municipal Code (65 ILCS 5/2-57-070). The Board found that General Order 93-03 had been complied with and that there was no substantial violation of the General Order. The Board also stated that it did not believe that the remedy for violation of the General Order was

dismissal of charges. In regards to the IPRA regulation, the Board found that it did not apply because it did not go into effect until September 2007 and did not apply retroactively. In addition, the Board noted that even if this regulation did apply and was violated, the remedy was not dismissal of charges.

Based on its analysis of the law and Mr. Viguera's legal arguments, the Board granted Mr. Viguera's motion in part and denied it in part. The Board then went on to consider the remaining charges. In regards to the charge of making a false statement, the Board found that Mr. Viguera made a false statement by denying that he was engaged in an altercation with Ms. Castillo, by denying that he had consumed alcoholic beverages or was intoxicated, by denying that he saw any additional police officers arrive on the scene, by denying that he was in an unjustified altercation with Mr. Dean and by denying the details of that altercation, and by denying that he went downstairs to retrieve his gun from employees of Salud.

In finding Mr. Viguera guilty of the remaining rule violations, the Board recited its findings as to the witness testimony presented. As to Mr. Dean, the Board found that he credibly testified to seeing Mr. Viguera push Ms. Castillo up against the wall outside of Salud and as to the details of the altercation with Mr. Viguera. The Board found that Mr. Dean's testimony was corroborated by other witnesses, Diana Jean-Louis and Janet Cruz. The Board noted that Ms. Jean-Louis and Ms. Cruz had no connection to the parties.

Ms. Cruz was one of the witnesses who called 911 and testified to the details of the altercation between Mr. Dean and Mr. Viguera. Ms. Jean-Louis also saw the altercation. The Board cited Ms. Cruz and Ms. Jean-Louis' testimony in which they testified that they saw Mr. Viguera hit Mr. Dean with a gun and that Mr. Dean was not acting aggressively toward him.

Similarly, the Board credited the testimony of Brian Frost who also called 911. Mr. Frost was sitting in his car at the intersection when he observed the altercation between Mr. Viguera and Mr. Dean. Mr. Frost's testimony was consistent with that of Ms. Cruz and Ms. Jean-Louis.

The Board also credited the testimony of Adam Geenan and Joseph Lore who were employees at Salud and testified that they believed Mr. Viguera was intoxicated and that he came into the basement of Salud to retrieve his gun.

The Board found Mr. Viguera's testimony not credible because his version of events was contradicted by the testimony of Mr. Dean, Ms. Jean-Louis, Ms. Cruz, Mr. Frost, Mr. Geenan, and Mr. Lore. The Board also noted that despite Mr. Viguera's claim that Mr. Dean was the aggressor, Mr. Viguera did not attempt to arrest him, take police action, or file a report. The Board rejected Mr. Viguera's argument that witnesses misidentified the clothing he was wearing and were not credible.

The Board found that Mr. Hernandez's testimony was not credible because he was an interested witness and had been drinking that night. Mr. Hernandez testified that Mr. Viguera was not fighting with Ms. Castillo and that he did not pull his gun out on Mr. Dean. The Board found this testimony contradicted by several of the other witnesses.

The Board also examined Henry Heredia's testimony. Mr. Heredia was the security person at Salud and testified that he saw two black males fighting with Mr. Viguera and that one of them was hitting Mr. Viguera with a gun. Mr. Viguera argued that Mr. Heredia's testimony supported his version of events. The Board found that it did not.

After concluding that Mr. Viguera was guilty of all of the rule violations, the Board found that Mr. Viguera should be discharged from duty. The Board noted Mr. Viguera's lack in judgment in bringing his gun with him to the bar, in becoming intoxicated, and getting into an



altercation with Mr. Dean. The Board stated that Mr. Viguera's actions were reckless, violent, and unjustified and that Mr. Viguera knowingly and intentionally made false statements regarding them. In conclusion, the Board stated that any one of the rule violations by itself justified discharge.

## ANALYSIS

### *A. Statute of Limitations*

In his motion to dismiss before the Board, Mr. Viguera argued that all of the charges were barred by the five-year statute of limitations found in section 10-1-18.1 of the Municipal Code. Section 10-1-18.1 only applies to charges "based upon an allegation of the use of unreasonable force by a police officer." 65 ILCS 5/10-1-18.1.

By a majority vote, the Board found that only Rule 8 Count III and Rule 9 Count II were barred by the statute of limitations. Those counts were based on rule violations stemming from the allegation that Mr. Viguera hit Mr. Dean with his gun. The majority reasoned that only these counts were barred because section 10-1-18.1 required Mr. Viguera to be acting as a police officer at the time unreasonable force was used and that he was doing so in his encounter with Mr. Dean because he announced that he was a police officer. The majority found that there was credible evidence establishing that Mr. Viguera announced that he was a police officer, pulled his gun, and pointed the gun at Mr. Dean. Therefore, the Board found that any charges based on the actual physical altercation between Mr. Viguera and Mr. Dean were barred.

On the other hand, the majority found that the remaining charges were not barred because Mr. Viguera was either not acting in his capacity as a police officer or the charges did not allege the use of unreasonable force. The majority found that the statute of limitations did not apply to the altercation Mr. Viguera had with his girlfriend, Ms. Castillo, because Mr. Viguera did not

announce that he was a police officer. The majority also found the violations related to Mr. Viguera making false statements about the incident to be separate and apart from any improper action he took against Mr. Dean.

In his complaint for administrative review, Mr. Viguera asks the Court to reverse the Board's decision, in part, and find that all of the charges are barred by the statute of limitations. Whether the statute of limitations operates to bar the charges against Mr. Viguera is an issue of law that is reviewed *de novo*. *Cinkus v. Village of Stickney*, 228 Ill. 2d 200, 210 (2008).

Section 10-1-18.1 provides:

Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held. If the charge is based upon an allegation of the use of unreasonable force by a police officer, the charge must be brought within 5 years after the commission of the act upon which the charge is based.

65 ILCS 5/10-1-18.1

When interpreting a statute, the Court is required "to ascertain and effectuate the true intent and meaning of the legislature," by giving the language of the statute "its plain and ordinary meaning." *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 37-38 (2009). The statute should be construed as a whole and each provision construed in such a way that no term is rendered meaningless. *Id.* Most importantly, the court should not "add provisions that are not found in a statute" or read in "exceptions, limitations, or conditions..." *Id.*

Based on the plain language of the statute, charges based on the "use of unreasonable force by a police officer" must be filed within five years of the alleged incident. Moreover, the statute explicitly limits the five-year statute of limitations to charges involving allegations of unreasonable force and does not expand it to any and all charges arising from the same incident.

To adopt Mr. Viguera's interpretation that all of his charges are barred would be to read into the statute a condition that does not exist.

The next issue is whether the Board properly differentiated between the charges based on the actions Mr. Viguera took against Ms. Castillo from those he took against Mr. Dean. Mr. Viguera argues that he was acting as a police officer at all times and therefore any charges of unreasonable force must be brought within five-years of the incident. The Board reasoned, however, that the statute of limitations only applied to situations in which Mr. Viguera announced his office and was acting as a police officer. The Board cited to a section 1983 case in which the Federal Court of Appeals stated that "when an officer identifies himself as a police officer and uses a pistol, he acts under color of law..." *Jocks v. Tavernier*, 316 F.3d 128 (2d Cir. 2003).

In the context of police misconduct, "unreasonable force" is a term of art that describes unlawful conduct by an official acting within his or her powers as a police officer. The very notion of "unreasonable force" contemplates that a law enforcement official is permitted to exercise some force due to the nature of his or her function as a peace officer. Such force is not condoned in settings outside the official's law enforcement responsibilities. Therefore, in order for the charges of unreasonable force to be barred by the statute of limitations, the incident giving rise to those charges must involve the police officer acting as a police officer or in other circumstances that put the citizen involved on notice of the officer's status.

By announcing his status as a police officer to Mr. Dean, Mr. Viguera purported to assert his authority as a police officer in the subsequent altercation. On the other hand, Mr. Viguera took no steps to inject his law enforcement status when interacting with Ms. Castillo. Rather, he was acting as an everyday citizen. Accordingly, it was proper for the Board to



dismiss the charges for the altercation with Mr. Dean, as barred by section 10-1-18.1, and not those for the altercation with Ms. Castillo. The Board did not err in its application of the statute of limitations.

*B. Due Process*

Mr. Vigueras argues that his due process rights were violated by the delay in bringing charges against him for the rule violations. The Board took the position that his due process rights were not violated because there was no delay between when charges were brought and the hearing. Mr. Vigueras argues that the more than five year delay between when the investigation started and when charges were brought is enough to violate due process because it prevented him from being able to properly prepare a defense against the charges.

When determining whether a party's right to due process has been violated, the court must examine "the importance of the private interest and the harm to the interest because of the delay; the government's justification for the delay and its connection to the underlying government interest; and the likelihood that the interim decision may have been mistaken." *Lyon v. Department of Children and Family Services*, 209 Ill. 2d 264, 277 (2004). Illinois jurisprudence is clear "that every citizen has the right to pursue a trade, occupation, business or profession," and denial of that right implicates due process concerns. *Id.* at 272.

In the *Lyon* case, the Court found the delay in providing a hearing after the Department of Children and Family Services determined a report of child abuse to be "indicated" violated the plaintiff's due process rights. An indicated report of child abuse prevented the plaintiff, who had been a teacher, from working as a teacher, and there was evidence that he had lost employment. Further the low quantum of evidence to sustain the finding "credible evidence" heightened the risk of error. Accordingly, the Court held that where the indicated finding was made on such a

low standard of proof and the consequences of the pending charges were loss of employment, the failure to promptly adjudicate the matter on its merits resulted in a due process violation. *Id.*

Similarly, in *Stull v. Department of Children and Family Services*, 239 Ill. App. 3d 325 (5th Dist. 1992), the court held that delay in the adjudication of a finding of child abuse resulted in a violation of due process because the charge on the plaintiff's file prevented him from working as a teacher. The appellate court took a similar position in *Morgan v. Dept. of Financial and Professional Regulation*, 374 Ill. App. 3d 275, 299 (1st Dist. 2007), which involved the summary suspension of a therapist's license, where the administrative action prevented the plaintiff from working in his chosen profession.

Here, in the case at bar, Mr. Vigueras has failed to articulate what harm he suffered as a result of the delay and has therefore not identified the deprivation he suffered as a result of the delay. Unlike the plaintiffs in *Lyon*, *Stull*, and *Morgan*, Mr. Vigueras was able to maintain his job at the police department until the Board reached its decision. There is evidence in the record that indicates Mr. Vigueras was placed on duty restrictions in January 2010 when the charges were filed, but nothing suggests that his pay was reduced or that he was adversely affected by that change in duties.

In determining whether a due process violation occurred, the Court must first examine "the importance of the private interest and the harm to the interest because of the delay." *Lyon*, 209 Ill. 2d at 277. Mr. Vigueras' failure to establish the harm he suffered that affected his interest in pursuing his profession begins and ends the due process analysis. In short, Mr. Vigueras has not shown a deprivation of his due process interest.

Mr. Vigueras also argues, however, that his due process rights were violated by the delay because he was unable to fully investigate the facts and present evidence that would have been

available had the hearing taken place at an earlier date. Mr. Vigueras points out that he was prevented from talking to potential witnesses by the IPRA rules. He contends that the discrepancies in witnesses' accounts and their inability to recall details illustrate the inherent harm in a delay of over five years from the date of the incident until the hearing.

The Police Superintendent's long delay in bringing the charges is troubling. This is particularly so because the Superintendent has offered no explanation to account for the long lapses of time. Indeed, the record shows that IPRA completed its investigation promptly. The record is also silent concerning actions the Superintendent took to finalize the charges.

Nonetheless, delay alone does not constitute a due process violation. *See People v. Fisher*, 184 Ill. 2d 441, 459-460 (1998) (due process analysis requires examination of the private interest *and* harm of the delay)(emphasis added). Rather, there must be some showing that the delay adversely affected the plaintiff's rights or interests. Here, the record does not establish such adverse effects.

Mr. Frost's testimony during the hearing was consistent with the recording of his 911 call, which was made at the time he observed the incident from his car. During the hearing, Mr. Frost's testimony did not change nor did he claim to have forgotten material facts from that evening. Ms. Jean-Louis' testimony was also consistent with the recording of her 911 call and the information she relayed to the 911 operator that night. Like Mr. Frost's testimony, Ms. Jean-Louis' testimony was not different, and there was no indication that she could not remember the events of that evening. In addition, Mr. Vigueras' counsel hired an independent investigator, Mr. O'Callaghan, who testified that he interviewed several witnesses in 2010, closer in time to the original incident. Mr. O'Callaghan testified that there was only one witness whom he was unable to get a hold of, but he failed to identify who that witness was. Mr. O'Callaghan did not



indicate that witnesses were unable to remember facts or that he was unable to complete his investigation due to the passage of time.

Mr. Viguera relies on an opinion by Circuit Court Judge Kathleen Pantle, *Orsa v. City of Chicago Police Board*, 11 CH 8166. In *Orsa*, Judge Pantle found that there had been a violation of due process because the lengthy delay in the investigation could not be explained and also found grounds to dismiss the charges based on *laches*. Judge Pantle found that the accused police officers were heavily prejudiced by the delayed investigation because it prevented them from being able to track down and interview independent witnesses. *Orsa* is distinguishable from Mr. Viguera's case because in *Orsa*, the plaintiffs had video surveillance that contradicted the witnesses' testimony and supported the plaintiffs' claim that there were independent witnesses who could have been interviewed. As indicated above, here the contemporaneous accounts of the 911 calls were consistent with their testimony at the hearing.

Accordingly, the Court affirms the Board's finding that Mr. Viguera's due process rights were not violated.

*C. Violations of General Order 93-03 and Chicago Municipal Code 2-57-070 as Grounds for Dismissal*

Mr. Viguera argues that all of the charges should be dismissed because the IPRA investigators violated the Police Department's General Order and Chicago Municipal Code section 2-57-070. Under General Order 93-03, the IPRA is directed to complete an investigation within thirty days and if it cannot, then it must provide a reason for its request for an extension. Under the Chicago Municipal Code, the IPRA is required to notify the Mayor's Office, City Council, the complainant, and the officer if the investigation is not completed within six months. Mr. Viguera argues that IPRA violated these rules in this investigation, which resulted in a violation of his right to due process and therefore the charges should be dropped.

1. General Order 93-03

When an agency violates statutory deadlines, its untimely actions will be deemed void if the time frame provided is a mandatory one. *Stull v. Department of Children and Family Services*, 239 Ill. App. 3d 325, 332 (5th Dist. 1992). On the other hand, if the statutory timeframe is directory dismissal is not proper. Whether a time frame is directory or mandatory is determine by the legislative intent and “the consequences that would result from any given construction.” *Id.*

General Order 93-03 states:

Complete the investigation as soon as possible, but no later than thirty days after the date the complaint was received or on the date of any authorized extension. If the investigation, due to its nature or complexity will require more than thirty days to complete, the investigator will submit a Request for Time Extension form for each extension ...Each time a request for an extension of time is submitted by an investigator, the reason for the request must be clearly justified.

Other provisions of the General Order state that the investigation should not be unduly extended for minor infractions, but that investigations that are serious in nature or involve the integrity of the department will result in further investigation.

Reading the provisions of the General Order together, the time frame cited by Mr. Vigueras is directory, not mandatory. The language of the General Order contemplates that the length of an investigation will necessarily depend on the facts of the case and also protects officers facing immediate suspension in that it prohibits officers from being suspended without pay for “more than two tours of duty.” (General Order 93-03.) Moreover, the General Order does not specify the consequences for non-compliance. Rather, it requires that requests for extensions must be made.

In this case, extensions were requested and granted. Therefore, the Court finds that a violation of General Order 93-03 does not warrant dismissal of Mr. Vigueras' charges and affirms the Board's finding on this issue.

2. Chicago Municipal Code 2-57-070

Mr. Vigueras also argues that the IPRA's violation of the Chicago Municipal Code warrants the dismissal of the charges. In its decision, the Board refused to dismiss the charges on this basis because the provision had not been enacted at the time the investigation began and it did not provide for the dismissal of charges in the event it was violated.

Chicago Municipal Code 2-57-070 was enacted on July 19, 2007. It provides:

If the chief administrator does not conclude an investigation within six months after its initiation, the chief administrator shall notify the mayor's office, the city council committee on public safety, the complainant, and the employee named in the complaint or his or her counsel of the general nature of the complaint or information giving rise to the investigation and the reasons for failure to complete the investigation within six months.

This provision establishes the policy for the IPRA and imposes procedural requirements upon it for investigations that are not concluded within six months of their initiation. It would appear that those procedural requirements had to be observed once the ordinance went into effect, regardless of when the charges were filed. *General Telephone Co. of Illinois v. Johnson*, 103 Ill. 2d 363, 383 (1984). Legislation becomes applicable on its effective date. *See McGinn v. Northwestern Steel & Wire Co.*, 68 Ill. App. 3d 632, 635 (noting that a recently enacted statute did not apply to a provision in a contract because the contract was entered into prior to the effective date of the statute).

Nonetheless there is nothing within section 2-57-070 that imposes any consequence for failure to comply with its notice requirements. Therefore, Mr. Vigueras has not established a basis to dismiss the charges against him for failure of the IPRA to follow section 2-57-070.



#### *D. Laches*

Mr. Vigueras argues that this case should be dismissed for *laches* because witnesses' memories are diminished and he was hampered in fully presenting his case. The Board argues that *laches* should not apply because Mr. Vigueras has failed to identify the prejudice to his case.

In order to state the affirmative defense of laches, a defendant must assert that: (1) the plaintiff has lacked due diligence in asserting its rights, resulting in an unreasonable delay; and (2) the defendant has been prejudiced by the delay. *See Sundance Homes v. County of DuPage*, 195 Ill. 2d 257, 270 (2001); *see also Van Milligan v. Board of Fire & Police Commissioners of the Village of Glenview*, 158 Ill. 2d 85, 89 (1994). The burden is on the defendant to establish laches by a preponderance of the evidence. *O'Brien v. Meyer*, 281 Ill. App. 3d 832, 834 (1st Dist. 1996).

There can be little dispute that delay of five years between the incident and the filing of charges is unreasonable. The initial IPRA investigation commenced the same day as the incident, December 23, 2006. By June 12, 2007, the investigator's case log indicates that twelve witnesses and twenty officers had given statements or had been interviewed by an IPRA investigator. The case log shows that witnesses continued to be contacted and interviewed through December of 2007. The case log then states that the "investigation was returned for additional" in January of 2010. The case log does not explain what "additional" work the investigation was returned for. Between May and July of 2010, the case log shows that additional statements were taken. On July 15, 2010, the case log indicates that the investigation was completed. An IPRA Investigator signed a closing report on January 26, 2011 and the Police Superintendent filed charges against Mr. Vigueras almost one year later, on January 9, 2012. The Defendants offered no explanation for these long intervals of inaction. However, in

order to justify the dismissal of the charges against Mr. Vigueras on the basis of *laches*, prejudice must also be established.

Mr. Vigueras claims prejudice because witnesses cannot fully recall the incident. He cites to the testimony of his friend, Mr. Hernandez, and his inability to remember whether Mr. Vigueras was drinking and the description of the man who allegedly pointed a gun at him, and to Mr. Dean's inability to recall whom he was with at Salud or a club later that evening. While Mr. Vigueras notes these failures, he does not explain how this evidence would have affected the Board's decision. For example, he does not explain how a change in Mr. Hernandez's testimony would have changed the Board's decision to discredit it or how Mr. Dean's recollection of events after the incident would have convinced the Board to give less weight to the accounts of the independent eye witnesses and the 911 calls.

Mr. Vigueras claims that the witnesses' failure to remember also prevented him from being able to effectively cross-examine the witnesses. However, several times when the witnesses appeared to add facts or forget them, his attorney impeached them with their previously prepared statements, statements which were made close to the date of the altercation. The witnesses also did not appear to forget any material facts, and their testimony was corroborated by other witnesses or consistent with independent evidence, such as the 911 tapes. It should also be noted that Mr. Vigueras' counsel hired a private investigator, David O'Callaghan, at some point in 2010. Mr. O'Callaghan testified that he interviewed Mr. Dean and several other witnesses on May 23, 2010. Mr. O'Callaghan was not asked to list who the other witnesses were, what their statements were to him, or whether the witnesses he spoke to had difficulty remembering the events of the night. If there were such issues, Mr. O'Callaghan could have testified to them.

Mr. Viguera cites to *Mank v. Board of Fire and Police Commissioners*, 7 Ill. App. 3d 478 (5th Dist. 1972), in which the appellate court agreed that *laches* applied where the case depended on witnesses recollection and several of the witnesses were not available. The court noted that filing charges 39 to 44 months after the incident occurred was “sufficient to cause prejudice where the factual dispute is solely dependent on recollection.” However, *Mank* is distinguishable from the case at bar because here the Board had the 911 tapes which corroborated the witnesses’ testimony, and therefore the factual dispute was not solely dependent on the witnesses’ recollections.

Accordingly, the Court affirms the Board’s finding that the doctrine of *laches* does not bar the proceedings against Mr. Viguera.

*E. The Board’s Decision that Mr. Viguera was Guilty of the Rule Violations*

Mr. Viguera argues that the Board’s decision sustaining the charges is against the manifest weight of the evidence because its credibility determinations were in error and it improperly relied on certain witnesses’ testimony. Mr. Viguera attacks the Police Board’s reliance on Mr. Dean’s testimony and the independent witnesses who corroborated his testimony. Mr. Viguera points to a variance in their stories in regards to details such as what Mr. Viguera was wearing that night. In addition, Mr. Viguera argues that the Police Board improperly discounted independent witness testimony that corroborated his version of the events.

In order for the Court to overturn the credibility determinations of the Board, it must be convinced that an error was made. The Court is not permitted to reverse the agency’s determinations simply because “an opposite conclusion is reasonable or [because] the reviewing court might have ruled differently”. *Robbins v. The Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997).



After a review of the evidence, the Court is not convinced that the Board made an error in its credibility determinations or its reliance on certain evidence. The Board found Mr. Vigeruas' testimony not credible, and it generally credited the testimony of Mr. Dean and the independent witnesses. Mr. Viguera argues these findings were improper because the witnesses could not agree on what he was wearing and that his testimony was corroborated by Mr. Hernandez, Mr. Heredia, and Gabrielle Dyson, a server at Salud. These arguments simply invite the Court to reweigh the evidence and make its own credibility determinations.

Moreover, the Board's factual assessments are not unreasonable. Mr. Viguera's version of events seemed to match up with that of his friend, Mr. Hernandez, but not with that of many other witnesses. Even considering Mr. Hernandez' testimony alone, there were some discrepancies that would appear to justify the Board not crediting it. For example, Mr. Viguera claims that he was not arguing with Ms. Castillo, but Mr. Hernandez testified that they were having a disagreement.

Mr. Heredia's testimony also seems consistent with Mr. Viguera's testimony, but there are also discrepancies that would justify the Board discounting it or not finding it credible. For example, Mr. Heredia claimed to have removed the gun from Mr. Viguera and the individuals he claimed to have seen fighting with Mr. Viguera, a fact that Mr. Viguera never testified to happening. Another discrepancy is that Mr. Viguera testified that he recovered his gun from the bar at Salud and not the basement, whereas Mr. Heredia testified that Mr. Viguera recovered his gun from the basement.

With respect to Ms. Dyson's testimony, it did not corroborate Mr. Viguera's testimony as claimed. Ms. Dyson testified that she knew Mr. Viguera from his coming into Salud, that she

saw other police officers escorting him out, and that she saw Mr. Dean getting beat up. Ms. Dyson's testimony contradicts Mr. Viguera's claims that he did not see other police officers.

In regards to the issue of whether he was intoxicated, Mr. Viguera's testimony was also contradicted. Mr. Viguera pointed to the testimony of his friends, Michael Fron, Jr. and Officer Charlene Rusiecka, to support his position that he was not intoxicated. These witnesses, however, admitted that they did not want Mr. Viguera to lose his job. In addition, they admitted that they were not with Mr. Viguera the entire night and did not know exactly what he was drinking. Further, Mr. Fron claimed to have seen Mr. Viguera drinking a cranberry juice, and Officer Rusiecka claimed to have seen him drinking a coke. On the other hand, independent witnesses, Mr. Lore and Mr. Geenan, employees at Salud, testified that they believed Mr. Viguera was intoxicated.

Also, in regards to making false statements, Mr. Viguera claimed never to have seen uniformed police officers on the scene and denied that he went in the basement of Salud. These statements are contrary to almost every witnesses' testimony, including his friend Mr. Hernandez. Every witness, even those like Officer Rusiecka who did not witness the altercation, saw uniformed police officers on the scene. The presence of officers is also established by the 911 tapes that police were being sent to the scene.

Finally, the record supports that Mr. Viguera's gun was improperly displayed. While Mr. Viguera claimed that someone removed his gun from its holster, the independent witnesses testified that Mr. Viguera pulled it out. It was within the Board's purview to resolve this contradictory evidence.

Mr. Viguera's arguments for reversing the Board's decisions are simply alternative findings that could have been made by the Board. They were rejected. There is evidence in the

record to support the inferences and conclusions that the Board drew, and the Court cannot say that they are against the manifest weight of the evidence. Accordingly, the Court affirms the Board's decision finding Mr. Viguera guilty of the rule violations that were not dismissed.

*F. The Board's Decision to Terminate Mr. Viguera*

Mr. Viguera argues that the penalty of discharge was excessive, especially in light of the fact that he was able to continue as a police officer for a period of time. The Police Board found that they cannot have officers patrolling the streets of the City committing acts like those that Mr. Viguera was accused and found guilty of. Mr. Viguera asks the Court to discount this concern because the Department allowed him to continue working after this incident. Mr. Viguera also points to the various awards and honorable mentions that he received after this incident.

In determining the appropriateness of a sanction, the Court's inquiry is limited to "whether the Board acted unreasonably or arbitrarily by selecting a type of discipline that was inappropriate or unrelated to the needs of the service." *Siwek v. Police Board of the City of Chicago*, 374 Ill. App. 3d 735, 738 (1st Dist. 2007). Termination may be an appropriate sanction for violation of a single rule. *Id.* A police board's decision to terminate an officer should not be reversed if its findings are related to the requirements of service. *Petratis v. Bd. of Fire and Police Com. of the City of Palos Hills*, 31 Ill. App. 3d 864, 868 (1st Dist. 1975).

In its decision, the Board explained that it found Mr. Viguera's actions "reckless, violent, and unjustified." (Board's Finding and Decision, p. 31.) The Board noted that Mr. Viguera's actions of pointing his weapon at Mr. Dean and threatening him endangered Mr. Dean's life and the safety of innocent by-standers. The Board found that Mr. Viguera knowingly and intentionally lied about material issues in a "blatant attempt to cover up his serious misconduct."



*Id.* The Board stated that “no police officer, even one such as Viguera, who has no prior disciplinary history and numerous awards, can be allowed to remain on the job when he makes numerous material false statements about matters as serious as those present in this case.” *Id.* The Board concluded that “any one of the following rule violations, by itself, was sufficiently serious to constitute a substantial shortcoming that renders Mr. Viguera’s continuance in his office detrimental.” *Id.* at p. 33.

In determining the discipline that Mr. Viguera received, the Board considered that Mr. Viguera had a clean disciplinary record and even recognized the awards that he received since the incident occurred, and yet the Board concluded that Mr. Viguera should be terminated. In deciding to terminate Mr. Viguera, the Board focused on Mr. Viguera being found guilty of making false statements. The Board explained that Mr. Viguera’s intentional lying to the IPRA investigators would undermine the public confidence in the Police Department and therefore could not go unpunished. The Board also explained that it felt returning Mr. Viguera to service was “an unacceptable risk to the safety of the public” because there was no guarantee that Mr. Viguera would not become intoxicated and engage in the same type of behavior at issue in the present case. *Id.* at p. 32.

Mr. Viguera asserts that discharge is excessive because he continued to serve as a police officer from the time of the incident until he was placed on duty restrictions in 2010. Even then Mr. Viguera was not terminated until the Board’s decision which was issued on September 21, 2012. Mr. Viguera not only continued to serve as a police officer during this time, but he also received several awards and avoided any additional disciplinary action.

The Court acknowledges that in certain instances inaction by a Police Department may warrant a finding that discharge is excessive. *Collins v. Bd. of Fire and Police Com. of the City*

*of Genoa*, 84 Ill. App. 3d 516 (2d Dist. 1980) (the court found discharge to be unwarranted because the police department did not take any immediate or severe action against the officer). However, here the Board's basis for termination did not rely solely on the events that occurred on December 23, 2006. Rather, the Board's focus in finding grounds for termination was not only the events of December 23, 2006, but rather the numerous false statements that Mr. Vigueras made throughout the IPRA investigation. The Board characterized Mr. Vigueras' making of false statements throughout this process as "intentional and premeditated lying...." *Id.* at 31. Moreover, his making of false statements, as the Board found, occurred throughout the investigation.

The value of truth telling in the operation of a police force cannot be overstated. An officer's failure to honestly report facts can endanger the pursuit of an actual perpetrator, disrupt an investigation, result in the prosecution – or worse – conviction of the innocent, and taint evidence presented in court. Further, such conduct engenders distrust of the police department as a whole and creates disrespect for law enforcement in general. In this case, the misstatements permeated the investigation. They were not confined to the time of the incident. In this respect, there is a basis for the Board's conclusion that Mr. Vigueras engaged in a conscious attempt to cover up misconduct. Misstatements and cover-ups in investigations are inimical to core responsibilities of police officers.

Moreover, the incident giving rise to the charges was egregious itself. Mr. Vigueras engaged in an altercation with his girlfriend that escalated to a point that a bystander felt the need to come to her rescue. Rather, than diffusing the situation, as police officers often must do in situations involving domestic disputes, Mr. Vigueras escalated a volatile situation, displaying his weapon and invoking his status as a police officer – all in an attempt to gain advantage in what

began as a private dispute. This lack of judgment or inability to check his emotions raises significant concerns about Mr. Viguera's future performance as a police officer. The fact that the incident was witnessed by so many and many of the bystanders knew or became aware of Mr. Viguera's position as a police officer underscores the gravity of the situation. Several police officers responding to a call involving a fellow officer not only affects the morale of the force but brings disrepute on the department. For all of these reasons, the Court concludes that the Board did not act unreasonably or arbitrarily in deciding to terminate Mr. Viguera. Accordingly, the Board's decision to terminate Mr. Viguera is affirmed.

### **CONCLUSION**

For the reasons stated above, the Court finds that the Board's decision is not legally erroneous on the issues of law, is not against the manifest weight of the evidence or clearly erroneous as to its credibility determinations or its findings of guilt for the rule violations, and that the Board has demonstrated a basis to discharge Mr. Viguera from his position as a police officer.

### **IT IS THEREFORE ORDERED:**

1. The Police Board of the City of Chicago's Decision of September 21, 2012 is affirmed.

Date: October 2, 2013

JUDGE RITA M. NOVAK  
OCT 02 2013  
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Judge: Rita M. Novak Circuit Court-1741